

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CHRISTOPHER BAKER,) CIVIL NO. 11-00528ACK
Plaintiff,) Honolulu, Hawaii
vs.) March 21, 2012
10:05 a.m.
LOUIS KEALOHA, as an) 1) Plaintiff's motion for
individual and in his) preliminary injunction
official capacity as)
Honolulu Chief of Police;) 2) Defendants Honolulu
STATE OF HAWAII; CITY AND) Police Department City and
COUNTY OF HONOLULU;) County of Honolulu and Louis
HONOLULU POLICE DEPARTMENT;) Kealoha's motion to dismiss
NEIL ABERCROMBIE, in his) the complaint
official capacity as Hawaii)
Governor,) 3) Defendant Neil Abercombie
and State of Hawaii's motion
Defendants.) for judgment on the
pleadings

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE ALAN C. KAY,
SENIOR UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiff: RICHARD L. HOLCOMB
Holcomb Law, LLC
1136 Union Mall, Suite 808
Honolulu, Hawaii 96813
KEVIN GERARD O'GRADY
The Law Office of Kevin O'Grady,
LLC
1136 Union Mall, Suite 808
Honolulu, Hawaii 96813

1 APPEARANCES: (CONT.)

2

3 For the Defendant City CURTIS F. SHERWOOD
4 and County of Office of Corporation Counsel -
Honolulu, Honolulu Honolulu
5 Police Department, 530 S. King Street, Ste. 110
Louis Kealoha as an Honolulu, Hawaii 06813
6 individual and in his
official capacity as
7 Honolulu Police Chief:

8 For Defendant Neil KENDALL J. MOSER
9 Abercrombie in his Office of the Attorney General -
official capacity as State of Hawaii
Hawaii Governor: Kekuanao'a Building
10 425 Queen Street
Honolulu, Hawaii 96813
11
12
13
14
15
16
17
18
19
20

21 Official Court GLORIA T. BEDIAMOL, RPR, RMR
22 Reporter: United States District Court
P.O. Box 50131
23 Honolulu, Hawaii 96850

24
25 Proceedings recorded by machine shorthand, transcript produce
with computer-aided transcription (CAT).

1 Wednesday, March 21, 2012 10:05 a.m.

2 THE CLERK: Calling the case of Civil Number
3 11-00528ACK-KSC, Christopher Baker versus Louis Kealoha, etc.,
4 et al. This hearing has been called for plaintiff's motion for
5 preliminary injunction, defendants' Honolulu Police Department,
6 City and County of Honolulu and Louis Kealoha's motion to
7 dismiss the complaint, and defendant Neil Abercombie and State
8 of Hawaii's motion for judgment on the pleadings.

9 Counsel, your appearances for the record please.

10 MR. HOLCOMB: Good morning, Your Honor, Richard
11 Holcomb here on behalf of the plaintiff Christopher Baker.

12 THE COURT: Good morning.

13 MR. O'GRADY: Good morning, Your Honor, Kevin O'Grady
14 appearing on behalf of Mr. Baker.

15 THE COURT: Good morning.

16 MR. SHERWOOD: Good morning, Your Honor, Deputy
17 Corporation Counsel Curtis Sherwood here on behalf of defendant
18 City and County of Honolulu, Honolulu Police Department, and
19 Chief Louis M. Kealoha.

20 THE COURT: Good morning.

21 MR. MOSER: Good morning, Your Honor, Kendall Moser
22 Deputy Attorney General for the State of Hawaii and Governor
23 Abercombie.

24 THE COURT: Good morning.

25 Anyone here representing the Brady Center?

1 MR. MURAKAMI: Your Honor, Mark Murakami here on
2 behalf of the Brady Center, but we're here and just rest on our
3 brief, Your Honor.

4 THE COURT: Very well. Please be seated. We have
5 three motions here.

6 Were you intending to put on any evidence,
7 Mr. O'Grady?

8 MR. HOLCOMB: We were not, Your Honor.

9 MR. O'GRADY: No, Your Honor. And for purposes of
10 today's motion hearing, Your Honor, Mr. Holcomb will be doing
11 most of the argument.

12 THE COURT: Very well. Let's proceed with the State's
13 motion for judgment on the pleadings.

14 MR. MOSER: Good morning again, Your Honor. In his
15 response to the state's and the governor's motion, the
16 plaintiff has conceded his monetary damages claims against
17 those two defendants, the State of Hawaii and the governor.

18 What that leaves then is his claim for injunctive
19 relief against them. And we have argued, Your Honor, that
20 there is no nexus between the governor and the enforcement of
21 Section 134-9.

22 Plaintiff does cite two examples of his attempt to
23 create a nexus between the governor and the enforcement of that
24 statute. In his response to the state and the governor's
25 motion, he says that the governor has, if you will, control

1 over the armed forces of the state and then also says that he
2 has ultimate authority over two divisions within the Department
3 of Public Safety, the Sheriff's Division, and the Division of
4 Narcotics Enforcement.

5 First of all, plaintiff presents no evidence that
6 either of those two divisions enforce Section 134-9 or any
7 other section of Chapter 134-9 for that matter. But even if
8 they did, plaintiff would still not have a claim against the
9 governor himself.

10 If you look at the organizational charts, there's the
11 governor, then the Department of Public Safety, then within the
12 Department of Safety, various divisions. At the most,
13 plaintiff is arguing that officials -- without evidence -- but
14 is arguing that officials within those divisions are
15 responsible for enforcing, along with the city and county and
16 the police department and so forth, 134-9.

17 So even if he was right, that still does not create
18 any nexus between the governor and the alleged violation of the
19 plaintiff's Second Amendment of rights under the Pennington
20 case.

21 So we would respectfully ask that the court grant in
22 its entirety the state and the governor's motion.

23 THE COURT: You haven't mentioned sovereign immunity.

24 MR. MOSER: Well, indeed. I will just very briefly,
25 for the reasons set out in our motion, both the state and the

1 governor have sovereign immunity. That has not been waived,
2 congress has not abrogated it. Again, even if one were to
3 accept the plaintiff's argument that there is an abrogation of
4 sovereign immunity, when one of the rights enumerated under the
5 first eight amendments is set out, as I'm sure we will hear
6 argument a little later this morning, there is no fundamental
7 right to possess a firearm outside of one's home. But that's
8 something that I guess we'll all be hearing about this morning.

9 So there is no abrogation; the state and the governor
10 do have sovereign immunity.

11 THE COURT: Thank you.

12 MR. MOSER: Thank you, Your Honor.

13 THE COURT: Mr. Holcomb.

14 MR. HOLCOMB: Good morning, Your Honor, may it please
15 court. Richard Holcomb here on behalf of Christopher Baker.

16 Very briefly, Your Honor. As far as what I call the
17 parties' arguments and who is going to be left holding the
18 flag, so to speak, essentially, Your Honor, what we are
19 concerned with is the ability of plaintiff, whether it be
20 Mr. Baker or another citizen, to challenge such laws.

21 It appears to us that the defendants are trying to
22 create insurmountable obstacles by having a party dismissed,
23 which they could then lay blame on for the actions alleged in
24 Mr. Baker's complaint.

25 In direct response to the state's argument, the

1 governor, Your Honor, is the chief law enforcement officer. He
2 is the head of the executive branch. He is by law required to
3 enforce these gun statutes, including the broad prohibitions
4 that are raised in our complaint.

5 THE COURT: Well, it's the chief of police who would
6 decide on whether or not to grant the permit.

7 MR. HOLCOMB: That's correct. But, Your Honor, for
8 example, the governor he does decide if you have the permit.
9 But we are operating under a threat of prosecution now if we
10 exercise our fundamental constitutional rights. And Mr. Moser
11 is arguing, I assume so will the city and county, that there is
12 no fundamental right to carry a firearm outside the home, which
13 we obviously disagree with.

14 But in addition to that, Your Honor, there is no
15 exception in the statutes to allow us to carry a pistol, for
16 example, within our home.

17 THE COURT: I think you are incorrect in that.

18 MR. HOLCOMB: Well, very well, Your Honor. But we
19 believe that is the plain language of the statute.

20 THE COURT: Have you looked at Rule 134-25?

21 MR. HOLCOMB: We've looked at 134-24 and 134-25. We
22 have looked at them all, but we believe the language of 134-24
23 and 134-25, which says you have to keep the firearm in a closed
24 container and you can't transport it to these specific places,
25 all have no exemptions or exclusions for places that Heller

1 itself specifically held are protected, even in it's most
2 narrow interpretation.

3 But as for the governor, Your Honor, we rely on Ex
4 Parte versus Young. There is a nexus here. And, in fact, we
5 believe the Ninth Circuit has approved the exact nexus that we
6 are speaking of. And that is it's the governor's duty, for
7 example, to appoint the head of the Department of Safety, who
8 is then the head of the state sheriff's department, who is also
9 charged with the duty of enforcing these prohibitions. And
10 that, Your Honor, we believe suffices as a sufficient nexus to
11 have the governor included.

12 As for the sovereign immunity claim, we concede that
13 no court has held that by ratifying the Fourteenth Amendment
14 that they have totally incorporated the first eight amendments,
15 and therefore sovereign immunity has been abrogated for that.
16 But we believe that it is the next logical conclusion, and we
17 leave that to the discretion of the court based on our analysis
18 in our brief.

19 THE COURT: What is the next logical conclusion?

20 MR. HOLCOMB: The next logical conclusion would be by
21 ratifying the Fourteenth Amendment where, based on for example,
22 Justice Hugo Black's dissent in Adamson, that they have
23 therefore totally incorporated the first eight amendments and
24 by doing so have abrogated sovereign immunity by having totally
25 incorporated --

1 THE COURT: In his dissent --

2 MR. HOLCOMB: What's that, Your Honor?

3 THE COURT: Judge Black's dissenting.

4 MR. HOLCOMB: That's correct. Yes. If you look at
5 McDonald, for example, it talks about Justice Black's dissent,
6 and it also has a discussion about the legal scholars
7 completely disagreeing with, for example, the slaughterhouse
8 case and had some discussion based on that. But we concede
9 that they did not specifically adopt what we're asking you to.

10 THE COURT: All right.

11 MR. HOLCOMB: That's it.

12 THE COURT: Thank you. I take it no other counsel
13 wishes to speak on this motion?

14 MR. SHERWOOD: No, Your Honor.

15 MR. O'GRADY: No, Your Honor.

16 THE COURT: Did you want to say anything more on this,
17 Mr. Moser?

18 MR. MOSER: No, thank you.

19 THE COURT: Okay. Let's move on to the motion to
20 dismiss.

21 MR. SHERWOOD: Thank you, Your Honor. As the court is
22 aware, given plaintiff's opposition, it appears that there are
23 only two arguments remaining for the court's decision with
24 respect to the city defendants' motion to dismiss. And those
25 concern plaintiff's failure to --

1 THE COURT: You better speak up.

2 MR. SHERWOOD: Plaintiff's failure to set forth his
3 claims in a short and plain statement pursuant to Rule 8 and,
4 likewise, his failure to abide by the Iqbal and Twombly
5 decisions insofar as the city's contention that plaintiff has
6 only alleged bear bones and conclusory allegations with regard
7 to the city defendants, specifically the allegation that,
8 quote, we maintain and enforce a set of customs, practices and
9 policies prohibiting Mr. Baker from keeping and bearing
10 firearms.

11 Plaintiffs do not set forth the policies or where the
12 policies -- these particular policies or practices go wrong.
13 Rather, he simply recites the same allegations over and over
14 again in approximately 165 paragraphs setting forth 13 claims
15 when essentially -- 13 causes of actions when essentially he
16 has maybe two or three claims against the city defendants.

17 In their opposition, they place high reliance on the
18 Hearn case. But as we noted in our reply, the instant matter
19 is distinguishable from the Hearn case, the reviewing court in
20 Hearn noted that plaintiff had set forth 17 different federal
21 and state claims clearly identifying each claim and each
22 defendant named.

23 Here we have all defendants lumped together with
24 essentially the same conclusory allegations alleged against
25 each.

1 I would also note that in each of the claims
2 plaintiffs are including nearly all the claims -- plaintiffs
3 are including state defendants as well. And they're claiming
4 that, as was just pointed out in the state's motion, alleging
5 that the state and the governor have illegal law or
6 unconstitutional laws in enforcing unconstitutional laws. If
7 they are going to proceed on alternate theories of recovery,
8 they need to set that forth in their complaint.

9 They can't say that, well, it's the laws that are
10 causing plaintiff's harm, and also it's the city defendants'
11 actions that are causing harm. So we maintain that they have to
12 set those forth alternatively.

13 With respect to the other argument, Your Honor, that
14 the claims against Chief Kealoha in his official capacity are
15 unnecessary and duplicitous, I think we've set forth a number
16 of cases establishing that premise. And although plaintiff
17 tries to distinguish those cases on factual grounds, I think
18 it's fairly well-established law at this point in time that if
19 he's going to name the city, in fact he's also named the police
20 department here, then any claims against Chief Kealoha in his
21 official capacity are simply unnecessary and duplicitous. And
22 so we would ask the court to --

23 THE COURT: Except with respect to injunctive relief.

24 MR. SHERWOOD: Yes, Your Honor. With respect to the
25 claim for injunctive relief, he can obtain that against the

1 city as well. I missed the court's entire question. Were you
2 asking about the argument that the claim for injunctive relief
3 is not a separate claim or his argument -- I'm sorry.

4 THE COURT: The claim as to whether he is entitled to
5 injunctive relief against Chief Kealoha because Chief Kealoha
6 is the officer and has the authority to grant permits.

7 MR. SHERWOOD: Well, Your Honor, it's our position
8 that he could obtain that same relief from the city and the
9 chief.

10 THE COURT: He is the individual who is in charge of
11 that?

12 MR. SHERWOOD: He is, according to the statute, Your
13 Honor. We believe the same relief could be obtained against
14 the city nevertheless.

15 THE COURT: I don't think the case law favors you in
16 that respect.

17 MR. SHERWOOD: All right. Your Honor. That's all I
18 have, Your Honor.

19 THE COURT: Thank you.

20 MR. SHERWOOD: Thank you.

21 THE COURT: Mr. Holcomb.

22 MR. HOLCOMB: Yes, Your Honor, briefly. As for the
23 Chief Kealoha claims, we are unaware -- we are aware that
24 indeed, as the city and county has pointed out, that when an
25 official is named and the city and the government entity is

1 also named that the courts have in their discretion held that
2 those parties, the individual parties, were duplicitous.

3 However, I am unaware of any authority suggesting that
4 the person that the statute names as the responsible actor, at
5 least insofar as our claims go to issuing this permit, should
6 be dismissed as a party because the government entity is also
7 raised.

8 As for their claims that our complaint is too long, I
9 think that we have carefully distinguished each of the cases
10 that they have relied on, each of those cases has very
11 egregious facts. For example, two of the cases that they rely
12 on are the same attorney --

13 THE COURT: Well, but you do lump all the defendants
14 together.

15 MR. HOLCOMB: Yes, Your Honor. And each of them had
16 been -- as I recall, each had been sanctioned or admonished not
17 to continue doing this. They continued to do that, and that's
18 where they're drawing these cases where the complaints are too
19 long and the complaint is dismissed.

20 THE COURT: But you do agree you lump all the
21 defendants together?

22 MR. HOLCOMB: What was that, Your Honor?

23 THE COURT: I said you do agree that you just lumped
24 all the defendants together.

25 MR. HOLCOMB: As far as lumping all the defendants

1 together, the language of the complaint does include those
2 defendants together in the same paragraph. We do agree with
3 that.

4 However, we also believe that our complaint has
5 specifically attributed some action to each defendant that
6 would cause them to be liable.

7 THE COURT: Not on each count.

8 MR. HOLCOMB: What was that, Your Honor?

9 THE COURT: Not on each count.

10 MR. HOLCOMB: Well, Your Honor, we do incorporate the
11 same language in each count in the same paragraph.

12 THE COURT: And you agree that injunctive relief is
13 not a separate count?

14 MR. HOLCOMB: We agree with that. Yes, Your Honor.

15 THE COURT: So that ought to be dismissed?

16 MR. HOLCOMB: Yes, Your Honor.

17 THE COURT: And do you agree that the Fifth Amendment
18 does not apply to the city?

19 MR. HOLCOMB: We do agree with that. We have read
20 Young, we were aware of Young before we filed this. I just
21 wanted to make sure that we raised everything that could
22 possibly be -- that needed to be raised. I will admit to the
23 court that I am not an expert pleader, if you will.

24 THE COURT: So does that -- the bottom line is you do
25 agree that the Fifth Amendment does not apply to the city?

1 MR. HOLCOMB: Yes, Your Honor.

2 THE COURT: Pardon me?

3 MR. HOLCOMB: We would argue that the Fourteenth
4 Amendment should cover what the Fifth Amendment does also
5 following McDonald having incorporated this to the state.

6 THE COURT: And the answer to my question is yes?

7 MR. HOLCOMB: Yes, Your Honor.

8 THE COURT: Anything else?

9 MR. HOLCOMB: Your Honor, I was going down the road of
10 talking about the complaint being -- their argument that the
11 complaint being too long. Would you like me to finish that or
12 are you satisfied with --

13 THE COURT: No, I tend to concur with the city. Your
14 complaint is excessively long and not that well pleaded
15 concisely.

16 MR. HOLCOMB: Well, Your Honor, I would note that we
17 believe our complaint is analogous to the Hearn case. And in
18 the Hearn case -- first of all, I would say that the only
19 thing at least consistently that they've argued in their
20 briefing were the arguments don't seem to go against -- the
21 previous argument is that the complaint is too long, and I
22 believe this is analogous to Hearn where they laid out
23 17 years of this guy's service to the San Bernardino Police
24 Department.

25 Here we have a comprehensive statutory scheme that we

1 have to challenge each specific wrong that we perceive from
2 this statutory scheme or we have waived those claims. And
3 that's what we sought to do. And we believe it is necessarily
4 longer than, say, your average First Amendment case just
5 because of the comprehensive nature of the statute.

6 I would also request, Your Honor, if you do order us
7 to amend the complaint, if we could get some guidance as to the
8 faults that the court finds in it specifically so that we can
9 address those specifically without undue delay.

10 THE COURT: Thank you.

11 Mr. Sherwood, anything more?

12 MR. SHERWOOD: Just very briefly, Your Honor. I would
13 state that if the court is inclined to keep Chief Kealoha in
14 only in his official capacity that those claims only be limited
15 to the injunctive relief.

16 I would also state that the court made some
17 clarifications with plaintiff's counsel in one argument that
18 was not addressed by plaintiff's opposition, which the court
19 did not seek clarification on, is whether plaintiffs admit that
20 the police department, a department of the city, which is non
21 sui juris, should also be dismissed.

22 Also --

23 THE COURT: Do you agree with that, Mr. Holcomb,
24 dismiss HPD?

25 MR. HOLCOMB: Your Honor, we have received -- should I

1 walk to the lectern?

2 THE COURT: Well, you can come up afterwards if you
3 are still going to argue on that.

4 MR. SHERWOOD: As I mentioned, Your Honor, I think we
5 set forth a number of authorities, both in this jurisdiction
6 and outside of this jurisdiction, holding that police
7 departments and sheriff departments are non sui juris. We've
8 even quoted the --

9 THE COURT: I agree with you on that. Go ahead.

10 MR. SHERWOOD: Okay. And just one last point of
11 argument, Your Honor. The plaintiff continues to draw the
12 comparisons to the Hearn case saying that in the Hearn case
13 they set forth this detailed factual background which they were
14 required to do.

15 THE COURT: You've already argued that.

16 MR. SHERWOOD: Okay. I won't belabor the point the,
17 Your Honor. Thank you.

18 THE COURT: Thank you.

19 Mr. Holcomb, anything more?

20 MR. HOLCOMB: Your Honor, we don't wish to follow up
21 at all on the HPD.

22 THE COURT: You agree that HPD should be dismissed?

23 MR. HOLCOMB: Yes, Your Honor.

24 THE COURT: Are we ready to go ahead with the motion
25 for preliminary injunction now?

1 MR. HOLCOMB: We are, Your Honor.

2 Your Honor, the fundamental question that you have to
3 address in this lawsuit is whether or not the right to defend
4 oneself extends beyond the threshold of a person's front door.
5 And I don't envy you for having to make that decision. As you
6 know --

7 THE COURT: A lot of other courts have.

8 MR. HOLCOMB: Well, a lot of other courts -- I believe
9 that this litigation, following Heller and McDonald, this
10 litigation appears to be in its inception. In fact, some of
11 the cases we've cited came out -- or one of the cases at least
12 that we cited in our reply came out the day that our reply was
13 due.

14 THE COURT: Pardon me?

15 MR. HOLCOMB: The district court case, for example,
16 the case that we cited in our reply to their response to our
17 preliminary injunction motion had come out the day that our
18 reply was due. So this litigation is very new following Heller
19 and McDonald.

20 THE COURT: Well, the Ninth Circuit en banc is
21 considering Nordyke again. And they just had argument on it
22 yesterday.

23 MR. HOLCOMB: It's interesting that you bring that up,
24 Your Honor.

25 THE COURT: Many cases have stayed their rulings on

1 these motion because of that.

2 MR. HOLCOMB: That's correct. That is correct, Your
3 Honor. It's interesting that you bring up Nordyke as well
4 because I think we had put in our pleadings that we're all kind
5 of waiting on Nordyke to see what they say to give us some
6 guidance.

7 My understanding is at oral argument on Monday, after
8 12 years of litigation in this case, the defendants conceded to
9 the panel that the plaintiff was correct that they could have
10 these gun shows that the plaintiff was asking for as long as
11 they used, quote, cables, unquote.

12 THE COURT: That's because the county allowed it.

13 MR. HOLCOMB: What was that, Your Honor?

14 THE COURT: I said that's because the county allowed
15 it.

16 MR. HOLCOMB: That's correct. Well, they did not
17 allow it initially. And only after -- my understanding is only
18 after 12 years this revelation came out in oral arguments on
19 Monday where they now make this concession. And, for our
20 purposes, I don't know that we can depend on Nordyke giving us
21 further guidance. Perhaps one of these cases that --

22 THE COURT: Well, I think the real issue in Nordyke is
23 the standard of review.

24 MR. HOLCOMB: That's correct. That's correct. But
25 what I'm suggesting to you, Your Honor, is the relief that the

1 plaintiffs sought, the defendants just said, yes, they are
2 right. In fact, the quote that I read, the attorney for the
3 defendant said King was wrong. The Nordykes can have their gun
4 shows if they use these cables which are antitheft devices.

5 THE COURT: Well, that's what Judge Kozinski said.
6 You win. Go home. But that's because the county allowed it by
7 regulation. It wasn't because they decided there was a
8 fundamental right.

9 MR. HOLCOMB: I agree that that -- I agree that they
10 would not find there's a fundamental right. But when you are
11 evaluating these regulations, and what we believe are outright
12 prohibitions, we had hoped that Nordyke would give you guidance
13 as to what standard should be used to make such decisions.

14 And now I'm suggesting to you that we can't rely on
15 Nordyke to give us such guidance.

16 THE COURT: We're not even meant to cite it.

17 MR. HOLCOMB: What's that?

18 THE COURT: According to the Ninth Circuit, we're not
19 even meant to cite Nordyke.

20 MR. HOLCOMB: That's correct. This is where we're
21 putting flesh on the bone, Your Honor. We must insist that the
22 first prong of the test that I would like to discuss for which
23 a preliminary injunction should issue and that's our likelihood
24 to prevail is apparent.

25 Once what we believe to be the inevitable conclusion

1 that the court will draw is that the right to defend oneself
2 does not extinguish at the threshold of the front door --

3 THE COURT: Is that issue even in the Nordyke case?

4 MR. HOLCOMB: Well, that's correct. But when you
5 evaluate these prohibitions, you have to determine whether a
6 rational basis, intermediate scrutiny or strict scrutiny would
7 apply, and everyone had expected that Nordyke would provide
8 those answers for you. But --

9 THE COURT: Whether it's a substantial burden.

10 MR. HOLCOMB: What was that, Your Honor?

11 THE COURT: Judge Scanlon went to the first matter of
12 substantial burden -- whether a substantial burden is imposed.

13 MR. HOLCOMB: That's correct. Several courts have
14 insinuated different ones would apply. We believe Heller
15 completely rejected rational basis, so you're stuck with either
16 intermediate scrutiny -- Nordyke had initially suggested a
17 heightened scrutiny, a little bit past intermediate scrutiny,
18 and others are holding or are insinuating -- for example, the
19 Fourth Circuit is insinuating that for a law-abiding citizen,
20 such as Mr. Baker, it should be a strict scrutiny standard.

21 But, in any event, Your Honor, I understand why you
22 are questioning me about Nordyke because you first must come to
23 the conclusion -- you have shared with me your thoughts that we
24 are wrong in interpreting the statute as preventing bearing a
25 pistol within the home. But you must first reach the

1 conclusion that there is some fundamental right outside the
2 home perhaps before you start applying these levels of scrutiny
3 at all.

4 And we believe Heller has answered that question for
5 you. They say specifically in defining the term "bear," the
6 majority wrote that at the time "bear" meant to carry. And
7 then they compare a dictionary from 1796 to 1989. When used
8 with arms, however, the term has a meaning that refers to
9 carrying for a particular purpose: confrontation.

10 In Muscarello, in the course of analyzing of the
11 meaning of carries a firearm, in a federal criminal statute,
12 Justice Ginsburg wrote that surely a most familiar meaning is,
13 as the constitution Second Amendment indicates, wear, bear or
14 carry upon the person, or in the clothing or in a pocket for
15 the purpose of being armed and ready for offensive or defensive
16 action in a case of conflict with another person.

17 THE COURT: So what was the bottom line of the Fourth
18 Circuit's decision?

19 MR. HOLCOMB: The Fourth Circuit's decision? The
20 Fourth Circuit did not apply any of these levels of scrutiny,
21 and we have Judge Niemeyer who is saying it is obvious that
22 Heller meant you have a fundamental right to bear a firearm
23 outside the home. For example, he says that he observes that
24 the Heller majority said you can regulate firearms in sensitive
25 places such as schools and government buildings. And Judge

1 Niemeyer observed that if there were no right to bear a firearm
2 outside the home, they would not need to condone regulation
3 within these -- I want to say special. I've lost the word --
4 but within these sensitive places.

5 THE COURT: I agree with you that the Supreme Court's
6 decision in Heller is not the best example of precision.
7 However, the Mascherano case, the Fourth Circuit case, which I
8 just asked you about, the bottom line quote I have is on the
9 question of Heller's applicability outside the home
10 environment, we think it prudent to await direction from the
11 Supreme Court itself.

12 MR. HOLCOMB: That's correct. They are -- as I said,
13 they are evading answering the ultimate question in my opinion.
14 But the district courts in the Fourth Circuit, and these other
15 cases that I told you came out near or at that time when our
16 reply was due -- for example, Judge Johnston in West Virginia
17 stated, The fact that courts may be reluctant to recognize the
18 protection of the Second Amendment outside the home, says more
19 about the courts in the Second Amendment limiting this
20 fundamental right to the home would be akin to limiting the
21 protection of First Amendment freedom of speech to political
22 speech or college campuses.

23 Judge Legg of Maryland said, In addition to
24 self-defense, the right was also understood to allow for
25 militia membership in hunting. To secure these rights, the

1 Second Amendment's protections must extend beyond the home.
2 Neither hunting, nor militia training is a household activity.
3 And self-defense has to take place wherever a person happens to
4 be.

5 THE COURT: Are you suggesting I should follow those
6 judges or should I follow the Fourth Circuit's bottom line?

7 MR. HOLCOMB: Well, Your Honor, I am suggesting that
8 you are squarely faced with this decision, and I can't point
9 exactly to what Judge Legg said. But Judge Legg, in his
10 opinion, analyzes that Fourth Circuit case, and he says that
11 the question was not so squarely presented to them in that case
12 as it is in this case, which is a similar statute to the one
13 we're challenging in Hawaii, the Maryland statute, where you
14 have to show good cause or whatever to get one of these
15 permits.

16 He says, I can't wait for these appellate courts to
17 make such decisions. I have to make this decision because the
18 plaintiff has squarely raised it. And then he concludes, as I
19 just read, that it has to be outside the home.

20 Once that recognition is made, the rest of the lawsuit
21 falls into place. For example, we've raised due process
22 violations. And the Second Circuit has held that the
23 plaintiffs stated a procedural due process claim where the
24 renewal of his previously issued permit was merely delayed.
25 And it appears from the facts of that case that the delay was

1 occasioned by the plaintiff's refusal to provide proof of
2 citizenship after having been asked to do so by the
3 authorities. And then the appeal of the authorities' decision
4 denying that renewal was scheduled 18 months afterwards.

5 THE COURT: We're not dealing with the renewal of a
6 permit here.

7 MR. HOLCOMB: No, we're not, Your Honor. We are
8 dealing, however, with a complete lack of due process in making
9 these decisions as to issue a permit at all. And here we don't
10 have a failure to comply with any request. Instead, we have an
11 insurmountable burden of proving that Mr. Baker's is, a quote,
12 an exceptional case. And it's shown by the exhibits to our
13 reply that we obtained in discovery no one seems to know what
14 an exceptional case even is and that we have no procedures
15 governing how they make these decisions.

16 THE COURT: Well, I think it would be disputed that
17 Mr. Baker's case is exceptional. He is the only one from 75
18 process servers who has had any problem in this line and who
19 has requested a permit for a gun.

20 MR. HOLCOMB: Okay. Even if his case is not
21 exceptional, our point is you should not have to show that you
22 have an exceptional case before you exercise a constitutional
23 right. And --

24 THE COURT: Of course that's presuming you have a
25 constitutional right.

1 MR. HOLCOMB: That's presuming that I have a
2 constitutional right. That's correct.

3 And once there's the recognition that I have that
4 constitutional right, we should have some sort of due process
5 governing whether or not we get the license, which is the only
6 means by which we could exercise that right.

7 Here we have the sole discretion of Chief Kealoha; we
8 have no appellate review whatsoever. We just have nothing.

9 THE COURT: Did Mr. Baker make a further request of
10 Chief Kealoha?

11 MR. HOLCOMB: I'm sorry, Your Honor?

12 THE COURT: Did Mr. Baker make a further request of
13 Chief Kealoha?

14 MR. HOLCOMB: He did not. He made his application,
15 which the statute requires, and then you are stuck with the
16 final decision. The defendants observed that he could reapply.
17 But that's not process, that's doing the same thing over again.
18 There's no panel review, there's no court we can go to --

19 THE COURT: No, but he didn't make a request for an
20 explanation of why he was denied.

21 MR. HOLCOMB: Well, he got a letter that stated
22 that --

23 THE COURT: -- he was denied.

24 MR. HOLCOMB: -- sufficient justification. We assume,
25 and I think the discovery thus far has shown that what they

1 mean by sufficient justification is you have not shown that
2 yours is an exceptional case, and therefore, we're denying your
3 permit.

4 Again, Your Honor, I know that you disagree with me,
5 but we do believe that the issuance of this permit is the only
6 means from the plain reading of 134-24 and 134-5, which you
7 have asked me about and I misspoke, it said 25, would allow
8 Mr. Baker to carry his pistol even within the confines of his
9 home or even within target shooting.

10 You had asked me about 134-5 earlier. What I read
11 that to say is that a person can use only a rifle or shotgun
12 when engaged in target shooting, but not a pistol or a handgun.
13 And part of the right, the ancillary rights that we must
14 recognize inherent in Heller, is the ability to participate in
15 proficiency training to properly qualify, to know that you have
16 the ability to use this tool properly, safely, and effectively.

17 THE COURT: Let me just read 134-25 to you. It's
18 entitled "Place to Keep Pistol or Revolver," semicolon,
19 penalty. Except as provided in Sections 134-5 and 134-9, all
20 firearms shall be confined to the possessor's place of
21 business, residence, or sojourn, semicolon, provided that it
22 should be lawful to carry, to carry unloaded firearms in an
23 enclosed container from the place of purchase to the
24 purchaser's place of business, residence, or sojourn or between
25 these places upon a change of place of business, residence, or

1 sojourn or between these places and the following, including a
2 target range.

3 So I don't agree with your reading of 134-25.

4 MR. HOLCOMB: That's correct, Your Honor. Our
5 position on the 134-24 and 25 is is that it requires at all
6 times that this pistol be enclosed in a --

7 THE COURT: No, it doesn't. I just read it to you.
8 It's only when you are carrying it from place to place that it
9 has to be enclosed in a container.

10 MR. HOLCOMB: Well, Your Honor, we were unable to find
11 any exception for carrying it within the home or for the
12 purpose of self-defense. And that's --

13 THE COURT: You were unable to find any restriction
14 within the home too.

15 MR. HOLCOMB: Well, we believe the plain language of
16 that statutory scheme subjects us to prosecution if, for
17 example, a police officer knocks on your door, and you come to
18 the door with a cowboy belt on, you've got your six shooters on
19 your side, we believe that the statutory scheme prohibits that
20 even if you don't walk outside your front door.

21 THE COURT: That may be your reading.

22 MR. HOLCOMB: Also, Your Honor, 134-5, as I understood
23 is what you've asked me about before, and that only authorizes
24 the use of a rifle or shotgun when engaged in target shooting.
25 It makes no exception for a pistol or handgun.

1 THE COURT: Again, I just read to you 134-25 which
2 does.

3 MR. HOLCOMB: All right. In any event, Your Honor, if
4 we come to what we believe is the inevitable conclusion that
5 the right to defend oneself does not extinguish at the front
6 door, the remainder of the prongs of our preliminary injunction
7 issue also fall into place as to the counts of our complaint.

8 The second prong is irreparable injury. And the
9 United States Supreme Court has long held that the loss of
10 freedom for even minimal periods of time unquestionably
11 constitute irreparable injury, and that's the Elrod versus
12 Burns case.

13 The Charles Wright treatise Federal Practice and
14 Procedures states that indeed when liberties are infringed,
15 irreparable injury is presumed. And accordingly, in a similar
16 gun rights case, the Seventh Circuit Court of Appeals has
17 recognized that because the Second Amendment protects similarly
18 intangible and unquantifiable interests as those secured by the
19 First Amendment, infringements of this right cannot be
20 compensated by money damages; therefore, injunctive relief is
21 appropriate.

22 THE COURT: Isn't your irreparable injury claims
23 speculative?

24 MR. HOLCOMB: Well, I don't think it is, Your Honor.
25 My client is -- well, I agree with you that it depends on,

1 based on our disagreement as to what 134-24, 25 and 134-5 says,
2 assuming that your reading is correct, it would then depend on
3 whether that right extends outside of the home.

4 But if it does extend outside the home --

5 THE COURT: No, I'm assuming that even taking your
6 position that it extends outside of the home.

7 MR. HOLCOMB: Well, Your Honor, I don't think that it
8 is a speculative right because the only way that he could do
9 that is to be issued a permit under Hawaii law. Otherwise, he
10 is committing either a Class B or C felony.

11 THE COURT: None of the other process servers seem to
12 have this problem that Mr. Baker does.

13 MR. HOLCOMB: I'm not aware of whether they've applied
14 or not. In any event, putting aside him being --

15 THE COURT: According to the declaration we have, they
16 haven't.

17 MR. HOLCOMB: What was that, Your Honor?

18 THE COURT: I said according to a declaration we have,
19 no other process server has applied.

20 MR. HOLCOMB: That's correct, I agree.

21 THE COURT: I thought you just said you weren't aware.

22 MR. HOLCOMB: I don't know if the other process
23 servers have applied. I guess the information you have is that
24 they haven't. But even putting aside Mr. Baker being a process
25 server, or whatever type of occupation that he has, he is a

1 citizen who wishes to exercise this right. And if he is unable
2 to do so, he is irreparably injured. And, in fact, that injury
3 should be presumed.

4 THE COURT: How is he irreparably injured but for
5 speculation?

6 MR. HOLCOMB: He is being denied exercise of his
7 constitutional right.

8 THE COURT: We're talking about irreparable injury.

9 MR. HOLCOMB: That's correct. Again, Elrod versus
10 Burns, the loss of freedom for even minimal periods of time
11 unquestionably constitute irreparable injury. The United
12 States Supreme Court held that in 1976.

13 And then we move to the third prong, Your Honor, which
14 is the balance of equities. And first I would note that Heller
15 appears to have rejected any balancing interest in at least
16 ultimately determining this lawsuit, whether this -- their
17 thinking on this would apply to injunctive relief or not, I
18 don't know yet.

19 But they said, we know of no other enumerated
20 constitutional right whose core protection has been subjected
21 to a freestanding interest balancing approach, the very
22 enumeration of the right takes out of the hands of the
23 government even the third branch of government, the power to
24 decide on a case-by-case basis whether the right is really
25 worth insisting upon.

1 A constitutional guarantee subject to future judges'
2 assessments of its usefulness is no constitutional guarantee at
3 all. Constitutional rights are enshrined with the scope they
4 were understood to have when the people adopted them, whether
5 or not future legislatures or, yes, even future judges think
6 that scope too broad.

7 We would not apply an interest balancing approach to
8 the prohibition of a peaceful neonazi march through Skogee, the
9 First Amendment contains the freedom of speech guarantee that
10 the people ratify, which included exceptions for obscenity,
11 libel and disclosure of state secrets, but not for the
12 expression of extremely unpopular and wrong headed views.

13 The Second Amendment is no different. Like the first,
14 it is the very product of an interest balancing by the people
15 which Justice Breyer would now conduct for them anew. And
16 whatever else it leaves to future evaluation, it surely
17 elevates above all other interests the right of the
18 law-abiding, responsible citizen to use arms in defense.

19 Even if we are to engage however in this interest
20 balancing approach, we should consider this balance of equities
21 in its entirety. This not only affects Mr. Baker's rights but
22 all of Hawaii citizens' rights. In fact, we have several
23 members of the community back here who wish to exercise their
24 Second Amendment rights.

25 And in that vein, the Ninth Circuit in Klein versus

1 City of San Clemente, and this is the case -- I don't know if
2 the court is familiar with it, but the guy was passing out
3 leaflets and leaving them on unoccupied vehicles expressing his
4 view about immigration, and he was approached by the police
5 officer, said, hey, you're violating this ordinance. If you
6 continue to do this, we're going to cite you. And he stopped
7 and he sued.

8 And the Ninth Circuit ruled that since the state
9 action affected, quote, anyone seeking to express their views
10 in the manner in the City of San Clemente, the balance of
11 equities and the public interest thus tips sharply in favor of
12 enjoining the ordinance. And similarly, Your Honor, the
13 statutes before you affect anyone who wishes to exercise their
14 fundamental right to keep and bear arms.

15 Accordingly, the balance of equities weigh in favor of
16 Mr. Baker as well. For those reasons, Your Honor we request
17 that you issue --

18 THE COURT: You haven't gotten to the fourth prong,
19 have you, public interest?

20 MR. HOLCOMB: The fourth prong, whether it serves the
21 public interest to grant relief. Well, Your Honor, the Ninth
22 Circuit has stated, quote, all citizens have a stake in
23 upholding the constitution and have concerns that are
24 implicated when a constitutional right has been violated. A
25 preliminary injunction vindicating Mr. Baker's and other

1 similarly situated citizens' fundamental rights, would advance
2 these types of interests, Your Honor.

3 As the United States Supreme Court said, the nation's
4 basic commitment to foster the dignity and well-being of all
5 within its borders. We believe that restricting this and
6 prohibiting this right is not doing a service to the public.
7 The defendants have --

8 THE COURT: Do you agree that the vast majority of
9 cases that have ruled on this have found that it would not be
10 in the public interest?

11 MR. HOLCOMB: Not since McDonald, I wouldn't think,
12 Your Honor.

13 THE COURT: The vast majority?

14 MR. HOLCOMB: I'm not aware of there being a huge
15 majority that have ruled on this specific issue since McDonald
16 was decided in 2010.

17 Before McDonald and before Heller, yes, I would agree
18 that the vast majority that would have decided it would have
19 held that. Because, at that time, there was no question as to
20 -- at least the belief was, throughout the bench and the bar,
21 that there was no constitutional right to carry arms except for
22 the military purposes because of the Miller case back in 1939,
23 which --

24 THE COURT: That's the way the Ninth Circuit would
25 rule too.

1 MR. HOLCOMB: I'm sorry, Your Honor. I am having
2 problems hearing you for some reason.

3 THE COURT: I said that's the way the Ninth Circuit
4 had ruled also.

5 MR. HOLCOMB: In?

6 THE COURT: As to the Second Amendment that there is
7 no right to bear arms.

8 MR. HOLCOMB: That's correct, yes. That's what all
9 courts, as far as I know, had assumed that Miller meant for 70
10 or 80 years.

11 And in 2008, of course, the Supreme Court said, No,
12 that's not what it meant at all. And it turned everything on
13 its head. And that's why I was telling you this was all in its
14 inception at this point.

15 Your Honor, as for the public interest, I assume what
16 you're getting to is the defendants have predictably argued
17 that issuing these permits might increase crime.

18 Our data that's from these government records we have
19 cited in our reply shows that gun ownership has increased, yet
20 violent crime has decreased. Over the last five years, Hawaii
21 experienced an 11 percent decrease in crime, according to the
22 City and County of Honolulu's service efforts and
23 accomplishment report from the office of the city auditor.

24 You contrast that with the Chicago statistic --

25 THE COURT: No, but under the statistics you just read

1 off, that didn't have anything to do with an increase in
2 permits being granted to carry guns in public.

3 MR. HOLCOMB: There are no permits being granted to
4 carry guns in public. So, yes, I concede the only correlation
5 that I can draw at this time is gun ownership. And there is no
6 evidence that -- if someone were going to --

7 THE COURT: Which is not what we're considering today.

8 MR. HOLCOMB: That's correct. But, I mean, if they
9 are not issuing the permits, how can I draw any correlation
10 based on Hawaii's history?

11 THE COURT: Well, that's why I wondered why you raise
12 that as a statistic in your favor.

13 MR. HOLCOMB: Well, I just wanted to show a
14 correlation that the frequency of people having these guns does
15 not correlate with any increase in crime.

16 THE COURT: Well, I'm not sure that anyone disagrees
17 with you on that. But that's not the issue before us.

18 MR. HOLCOMB: Okay. I guess then I'm misunderstanding
19 you. You said that I hadn't addressed the fourth prong. What
20 exactly are you looking for, Your Honor?

21 THE COURT: Well, you would have to establish that it
22 would be in the public interest to grant permits for people to
23 carry guns in the public.

24 MR. HOLCOMB: I believe that it is within the public's
25 interest to allow citizens the opportunity to defend oneself.

1 I believe that the right to self-defense --

2 THE COURT: Well, if someone cuts you off on the
3 highway, you can pull your gun out and shoot at them, which is
4 what happened here recently?

5 MR. HOLCOMB: That is already forbidden by the law.
6 We are not advocating changing, if someone pulls you off the
7 highway, that you can just shoot them. We are advocating for
8 the right to defend oneself, but the self-defense statutes
9 already have provisions where you cannot exceed the level of
10 force necessary to stop the threat.

11 THE COURT: I wasn't talking about a self-defense
12 situation.

13 MR. HOLCOMB: I know, Your Honor. You were talking
14 about a rampage killer. Our statistics show --

15 THE COURT: No, I was just talking about road rage.

16 MR. HOLCOMB: Yes, that's exactly what --

17 THE COURT: Not a rampage killer.

18 MR. HOLCOMB: Okay. Well, Your Honor, traditionally,
19 and we have these statistics cited that we're drawing all of
20 this from government documents in our reply that these people
21 who apply for handgun permits are very unlikely to go out and
22 commit crimes, whether it be caused by road rage or otherwise.
23 Indeed studies have shown that persons lawfully carrying a
24 firearm commit one over 182, that's a fraction,
25 one-one-eighty-second, the rate of the general public.

1 THE COURT: Is that what happened in Florida
2 yesterday?

3 MR. HOLCOMB: Well, Your Honor, you can draw all types
4 of anecdotal evidence that these people -- those people should
5 have been screened or should not have had firearms. These
6 things are going to happen.

7 Our point is criminals are going to have these guns
8 anyway. We are allowing a substantial portion of the public to
9 keep any firearm in their home to begin with. And then we say,
10 Well, you just can't carry it in public. Well, if you have a
11 criminal intent, you're going to violate that law as well.

12 So I don't see that allowing law-abiding citizens the
13 right to defend themselves, if they are confronted with one of
14 these criminals, has any effect on the public interest except a
15 favorable one allowing them to defend themselves against these
16 types of anecdotal evidence.

17 THE COURT: Again, I just say you have not persuaded
18 me in that regard.

19 MR. HOLCOMB: Well, Your Honor, the statistics we
20 cited is what we have to rely on.

21 THE COURT: Pardon me?

22 MR. HOLCOMB: I said the statistics we have cited are
23 the ones that we have to rely on.

24 THE COURT: Well, the other side cited a lot of
25 statistics too.

1 MR. HOLCOMB: I know, Your Honor. I don't have any
2 answer.

3 THE COURT: I will rely on my common sense too.

4 MR. HOLCOMB: Very well. That's what we're asking you
5 to do, Your Honor. We're asking you to grant our injunction
6 that we've asked for based on those reasons.

7 THE COURT: Thank you.

8 MR. HOLCOMB: Thank you, Your Honor.

9 THE COURT: Who wishes to speak next?

10 MR. MOSER: I will, Your Honor.

11 THE COURT: All right.

12 MR. MOSER: Your Honor, as the court is aware, the
13 state defendants have submitted opposition to the preliminary
14 injunction motion, the city and county defendants have as well,
15 and of course there's the amicus brief. A great deal has been
16 said in writing about the issues raised in the preliminary
17 injunction motion.

18 THE COURT: Well, they have an intervenor there in the
19 Brady Center too.

20 MR. MOSER: Yes, the amicus brief from the Brady
21 Center, correct, Your Honor.

22 And as I listened to the discussion between the court
23 and Mr. Holcomb on the issues raised in the motion, I'm
24 entirely satisfied that the court has a firm grasp on the
25 issues, and I don't --

1 THE COURT: Are you entirely satisfied with the
2 Supreme Court language in Heller?

3 MR. MOSER: It would be helpful, as I believe some
4 other courts have said -- well, I'm entirely satisfied with
5 that language to the extent it addressed the issue raised in
6 that case. And, of course, what the plaintiffs are attempting
7 to do in this case is to stretch that opinion to cover a
8 situation that was not an issue in Heller.

9 THE COURT: If it wasn't an issue, why did they use
10 that language such as can't use guns in sensitive places
11 outside of the home?

12 MR. MOSER: Well, they probably did say more than they
13 needed to to address the issues raised in that case. But at
14 the same time, they said that our list of places where firearms
15 should not be allowed is we don't mean that to be exhaustive
16 and as the court has --

17 THE COURT: Exactly.

18 MR. MOSER: Right.

19 THE COURT: Doesn't that favor the plaintiff's
20 position?

21 MR. MOSER: Well, I think that Heller stands for the
22 proposition, as does McDonald, that there is a fundamental
23 right under the Second Amendment.

24 THE COURT: A core right.

25 MR. MOSER: A core right.

1 THE COURT: What does a core right mean to you?

2 MR. MOSER: That it is one that is fundamental. I
3 don't understand the distinction between "core" and
4 "fundamental." To me, they are synonymous.

5 THE COURT: It's an essential part. That's what the
6 dictionary says. Part of what?

7 MR. MOSER: Well, a part of the right to defend
8 oneself within their home.

9 THE COURT: The right to defend themselves in their
10 home is an explicit right of what is the core a part of?

11 MR. MOSER: I don't know, Your Honor. And I won't try
12 to make up an answer.

13 THE COURT: And I think that's probably why the Fourth
14 Circuit said, We think it prudent to await direction from the
15 court itself.

16 MR. MOSER: Yes, I believe that is a prudent idea.
17 But before I go back and talk, just to touch on what Heller and
18 McDonald and other cases have said about defending oneself in
19 the home, I want to just remind the court that actually what
20 the plaintiffs are asking for in this preliminary injunction
21 motion is that the court strike nine sections of Chapter 134.

22 The one that's primarily at issue of course is 134-9
23 which relates to the plaintiff's efforts to obtain a permit or
24 a license to carry the firearm outside the home. All of the
25 other eight sections however have criminal penalties attached

1 to them, ranging from petty misdemeanor through misdemeanor,
2 Class C, and then ultimately Class B felonies.

3 And part of what we, on behalf of the state defendants
4 have argued, is that Mr. Baker does not have standing to
5 complain about those other eight subsections of Chapter 134, as
6 he has made no allegation that he has been arrested, charged,
7 convicted, sentenced for violating any of those sections of
8 Chapter 134.

9 So I believe that the court can easily dispose of his
10 request for injunctive relief as to those sections.

11 Getting back then, Your Honor, just a little bit to
12 Heller and McDonald, Heller -- neither Heller, nor McDonald,
13 nor the Ninth Circuit, nor even Judge Ezra, here within our own
14 circuit -- our district rather, in Young versus State of Hawaii
15 case found that there's a fundamental right to carry a firearm
16 outside the home.

17 THE COURT: Of course in Young that was prior to
18 McDonald, right?

19 MR. MOSER: It was -- yes.

20 THE COURT: It was prior to Heller being applied to
21 outside of federal property.

22 MR. MOSER: That's right. That decision was issued
23 between Heller and McDonald. That is correct.

24 THE COURT: Young did not even address that issue.

25 MR. MOSER: Well, the plaintiff from the big island,

1 in the Young case, wanted to have an open carry. He wanted to
2 openly carry. So that was the issue in that case. And he was
3 claiming that he had a Second Amendment right to do that.

4 So I guess in summary what I would say, Your Honor, is
5 that neither the law nor the facts support Mr. Baker's desire
6 to have a right to carry a firearm outside of his home.

7 Just looking at the facts, we have argued that the
8 situation that he encountered in which he cites as a reason for
9 wanting to have his permit, and borrowing some language from a
10 decision from a California court, the situation which he found
11 himself, he's not alleging that that was not adequately dealt
12 with by existing law enforcement resources.

13 The police responded not to his 911 call but to that
14 of the would be person that he was serving, and that's it. I
15 can fully understand the chief not finding that Mr. Baker's
16 circumstances warranted the issuance of a permit to carry.

17 THE COURT: Based on a 911 call?

18 MR. MOSER: Based on --

19 THE COURT: On who made the call?

20 MR. MOSER: Not Mr. Baker but the person at the home
21 at which he was attempting to serve process. So they are
22 actually the ones that called. So I think neither the law nor
23 the facts support the request for preliminary injunction as it
24 relates to any of the sections of Chapter 134 including Section
25 9.

1 So we would respectfully ask the court to deny the
2 motion for preliminary injunction in its entirety.

3 THE COURT: What about the status of the Nordyke case?

4 MR. MOSER: Well, there is one thing --

5 THE COURT: Many other cases in the -- or courts in
6 the Ninth Circuit have stayed their rulings until the Nordyke
7 en banc panel makes its ruling.

8 MR. MOSER: Well, that's I guess ultimately a decision
9 that the court will need to make. We don't really know when
10 we'll get guidance. And I think, as I was listening to the
11 discussion between Your Honor and Mr. Holcomb, I'm not sure
12 that Nordyke necessarily is going to give this court the
13 guidance that it might want to address and to decide the issue
14 that's raised in this case.

15 But again ultimately that's the court's decision
16 whether to withhold ruling until sometime when the Nordyke
17 decision comes out, and then we might of course be faced with a
18 situation where there's a petition for a rehearing or a
19 petition for cert. Given the state of the law and the lay of
20 the land, there might be a cert petition.

21 So if Mr. Baker is claiming that he is suffering some
22 irreparable injury, we don't know when we're going to hear the
23 final word of the Nordyke case. It could be sometime many
24 months or conceivably even a couple of years or so.

25 THE COURT: Thank you.

1 MR. MOSER: Thank you very much, Your Honor.

2 THE COURT: Mr. Sherwood.

3 MR. SHERWOOD: Thank you, Your Honor. I would like to
4 speak to a few brief points. I know that the court has covered
5 a lot of ground already.

6 The court just mentioned that in the Young case that
7 the court had not addressed whether there was a fundamental
8 right involved. We have set forth a quote in our brief where
9 Judge Ezra specifically determined, reviewing both Heller and
10 the Nordyke decisions, that, quote, neither case stands for the
11 proposition of a fundamental right to possess an unconcealed
12 firearm in public.

13 THE COURT: He was referring to the McDonald decision.

14 MR. SHERWOOD: Yes, Your Honor. And I understand that
15 McDonald came out subsequently. But all McDonald did was apply
16 that the Heller holding to the state -- Heller itself dealt
17 with the fundamental right issue. And Judge Ezra, in reviewing
18 Heller, he was reviewing whether he believed the fundamental
19 right was involved based on the language in Heller.

20 And of course we support Judge Ezra's conclusion that
21 the fundamental right existing outside the home does not exist.
22 And Heller does not support that conclusion.

23 The court inquired about the list of examples that the
24 Supreme Court had set forth in the Heller decision as cutting
25 against our arguments. But I don't believe it does, Your

1 Honor. All the court was saying, in setting forth the list of
2 examples, including the sensitive areas provision, was stating
3 that the laws which were on the books which restricted the
4 right to bear arms were presumptively valid.

5 And so the fact that --

6 THE COURT: You are referring to schools and hospitals
7 and other sensitive places?

8 MR. SHERWOOD: Right. Right. So the fact that the
9 legislature had previously curtailed the right to bear arms
10 with respect to those places did not mean that a right existed
11 with respect to the other places. And I think it's a broad
12 leap for the court to make to say that simply because the
13 legislatures had not regulated all areas, but it had chosen to
14 regulate certain areas, that a right existed to those
15 nonregulated areas that --

16 THE COURT: You are saying they held that a right did
17 exist in the nonsensitive areas?

18 MR. SHERWOOD: No, Your Honor. I'm not saying that at
19 all. I'm saying just the opposite. The fact that the court
20 set forth --

21 THE COURT: I thought that was your position; that's
22 why I wondered why you said that.

23 MR. SHERWOOD: Maybe I'm confused with what the court
24 said. We're saying the right does not exist outside of the
25 home. And the fact that the states have regulated certain

1 areas outside of the home doesn't mean that those other
2 nonregulated areas, a right exists. It's just that the states
3 have chosen not to regulate those areas.

4 And all the court was doing was recognizing that fact
5 as well as the restrictions on mentally ill and felons. All
6 the court was saying was that those regulations are still
7 proper. We recognize a fundamental right which existed in --

8 THE COURT: That wasn't the issue before --

9 MR. SHERWOOD: I'm sorry, Your Honor, I think I'm
10 speaking over you.

11 THE COURT: I said that wasn't the issue before that
12 Supreme Court in Heller.

13 MR. SHERWOOD: That's correct, Your Honor.

14 THE COURT: So why would they be speaking about that?

15 MR. SHERWOOD: Because they were entering new ground
16 at that point, Your Honor. Because it had not been -- the
17 matter had not been put squarely in front of them except for
18 the Robertson case which was approximately 100 years prior when
19 they said that bands aren't concealed, firearms were proper.

20 So I think knowing that they were recognizing this
21 right, they wanted to put the state at ease by stating that
22 these laws that had been enacted were still presumptively
23 valid.

24 When the plaintiffs address the issue of irreparable
25 harm, they mentioned the statistics that they had set forth in

1 their brief that firearm permits, that is the privilege to own
2 firearms within the state, has increased during the past four
3 years but crime has decreased.

4 We pointed out in our opposition that actually the
5 converse is true. Over the past three years, again plaintiff
6 notes that firearm permits have increased over the past four
7 years, over the past three years actually crime has increased.
8 And that's apparent in our --

9 THE COURT: Again, that had nothing to do with
10 carrying firearms in public, right?

11 MR. SHERWOOD: Well, not licensed carrying in the
12 public, Your Honor, but one would have to expect that murder,
13 forcible rape, robbery, aggravated assault, burglary, larceny,
14 motor vehicle theft, and arson were conducted in the public.

15 THE COURT: Well, you are not suggesting that we cut
16 back on the sale of firearms?

17 MR. SHERWOOD: No, Your Honor. I'm just simply
18 stating that this argument that plaintiffs have invented is
19 simply false.

20 THE COURT: I think you suggested also that he could
21 carry pepper spray.

22 MR. SHERWOOD: Yes, Your Honor. As far as I know,
23 there is nothing in Chapter 134 that would prohibit plaintiff
24 from doing that. Plaintiff is also a member of the armed
25 services, discovery has not been completed at this point, but I

1 would assume that he has some training in combative exercises
2 and is not simply at the mercy of those individuals that he
3 confronts.

4 Subject to the court's questions, additional
5 questions, that's all I have. Thank you.

6 THE COURT: What is your position on a stay with
7 respect to the Nordyke situation?

8 MR. SHERWOOD: Again, I would echo the state's
9 position. I'm not sure that the Nordyke decision will provide
10 this court much guidance, but I leave that to the court's
11 discretion. I believe the Nordyke court is essentially dealing
12 with the standard of review which may assist the court in
13 determining this motion. But, again, I leave it to the court's
14 review.

15 THE COURT: Thank you.

16 Mr. Holcomb.

17 MR. HOLCOMB: Your Honor, just very briefly. I want
18 to observe the state's argument about standing. They did not
19 raise that until their reply. And we believe, pursuant to
20 Local Rule 7.4, the court should not consider that. However --

21 THE COURT: Their reply?

22 MR. HOLCOMB: Their reply?

23 THE COURT: To their motion?

24 MR. HOLCOMB: Yes, Your Honor, to their motion. They
25 had filed a motion raising sovereign immunity and that the

1 governor should not be included. We responded, and then in
2 their reply they raised for the first time the standing issue.

3 But, nevertheless, even if the court should consider,
4 we're aware of no court that has held that someone should have
5 to go out and violate a criminal law and get arrested and
6 presumably convicted before they are able to challenge that
7 law. Indeed the threat of the prosecution is what gives us
8 standing.

9 Also, Your Honor, just very briefly, you had asked Mr.
10 Moser about the core of the Second Amendment right. The core
11 of this right is self-defense. That is what Heller stands for.
12 Self-defense again must occur where that person is situated
13 when the need arises to defend themselves. And that is what is
14 effectuated by the Second Amendment.

15 And briefly, in response to Mr. Sherwood, when he
16 noted that Mr. Baker has some combative training, even if he
17 were, say, the world's martial arts champion, he would be
18 unable to defend himself from a bullet from a criminal's gun
19 presumably. But that misses the point entirely because it is
20 often, we would believe, the vulnerable citizens that are
21 targeted for crimes. Again, this is going to affect the entire
22 populous of Hawaii including those vulnerable citizens.

23 Finally, Your Honor, striking 134-9 would not allow
24 Mr. Baker to carry a firearm. That's why either we had
25 requested, first of all, that you strike the prohibitions

1 against him carrying a firearm, which are the criminal
2 statutes, and alternatively to compel them to issue him this
3 permit.

4 That's all I have, unless you have further questions,
5 Your Honor.

6 THE COURT: What's your position on the stay based on
7 Nordyke?

8 MR. HOLCOMB: Well, again, Your Honor, I do not
9 believe Nordyke is going to give us any guidance. Initially,
10 if you had asked me two weeks ago, I would said, Yes, I think
11 Nordyke is going to at least define the level of scrutiny which
12 you should apply in determining the statutes. But since on
13 Monday my understanding that the defendant conceded that the
14 Nordykes had been correct for 12 years, I don't anticipate
15 there being any meaningful guidance.

16 As the court observes, it is also my understanding
17 that a number of these cases have been stayed pending Nordyke.
18 I cannot point to one specifically that I can say, Hey, Judge,
19 when this goes up in front of the Ninth Circuit, we should get
20 some guidance. So I just don't know.

21 THE COURT: Thank you.

22 MR. HOLCOMB: Thank you, Your Honor.

23 THE COURT: Any counsel wish to say anything more?

24 MR. MOSER: May I?

25 THE COURT: You may.

1 MR. MOSER: Your Honor, it is the state that brought
2 up the issue of standing. And I would just remind us all that
3 standing is jurisdictional, and jurisdiction can be raised at
4 any time.

5 Even in his oral presentation this morning,
6 Mr. Holcomb said that he addressed the issue of standing and
7 said that it's the threat of prosecution which gives him
8 standing. But I don't believe that's the standard whatsoever.

9 THE COURT: Thank you. I'm ready to rule.

10 It appears that no one really feels that we should
11 stay this matter based on the Nordyke en banc panel review.

12 So for reasons to be discussed in my written order, I
13 will deny the plaintiff's motion for preliminary injunction and
14 find that it fails on all prongs.

15 I find that it would be unlikely to prevail on the
16 merits, that there is no irreparable damage or injury that
17 would be speculative balancing of the equities that favor the
18 defendants. And granting the injunction would not be in the
19 public interest. And all of that will be discussed in more
20 detail in my order.

21 I will grant in part and deny in part the city's
22 motion to dismiss the complaint. And I will grant the state
23 defendant's motion for judgment on the pleadings.

24 As far as the motion to dismiss, based on Rule 8A, I
25 will deny the motion in that respect. Even though the

1 complaint is very lengthy and lumps the defendants, it's not
2 sufficiently precise and really doesn't -- I do find that it is
3 sufficient as far as Iqbal and Twombly though in clearly
4 setting out various claims.

5 I will dismiss the HPD and dismiss Chief Kealoha in
6 his official capacity except with respect to the injunctive
7 relief. If plaintiff sets forth a sufficient amended complaint
8 to implement that, count 13 is dismissed. That's the count on
9 injunctive relief. That's not a stand alone count. And the
10 Fifth Amendment rights would be dismissed as to the city
11 defendants. Otherwise, my written order will spell out the
12 court's reasoning. Thank you all.

13 (Recess at 11:24 a.m.)

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT REPORTER'S CERTIFICATE

I, Gloria T. Bediamol, Official Court Reporter, United States District Court, District of Hawaii, do hereby certify that the foregoing is a true, complete and correct transcript from the record of proceedings in the above-entitled matter.

DATED at Honolulu, Hawaii, June 19, 2012.

/s/ Gloria T. Bediamol
GLORIA T. BEDIAMOL.
RPR, RMR